

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**MARCOS CALDERON**

Claimant

V.

**KBK INDUSTRIES, INC.**

Respondent

AND

**LIBERTY MUTUAL FIRE INS. CO.**

Insurance Carrier

Docket No. 1,070,237

**ORDER**

Claimant, through Scott J. Mann, requested review of Administrative Law Judge Bruce E. Moore's June 10, 2016 Award. Kip A. Kubin appeared for respondent and insurance carrier (respondent). The Board heard oral argument on October 13, 2016. The Board has carefully considered the record and adopted the Award's stipulations.

**ISSUES**

Claimant's Application for Hearing, filed with the Director of Workers Compensation on June 26, 2014, alleged that his November 29, 2013 accident resulted in injuries to his head, neck and back, as well as all affected body parts. The judge found: (1) claimant's back and neck complaints were unrelated to the accident; (2) claimant failed to prove permanent impairment; and (3) claimant was not entitled to future medical treatment.

Claimant argues his injury by accident resulted in permanent impairment to his neck and back. Claimant asserts his hired medical expert's opinions are more credible than the opinions of the court-ordered medical expert. Claimant contends he is entitled to future medical treatment. Respondent stipulated to compensability, but not permanency or claimant's need for future medical treatment. Respondent maintains the Award should be affirmed.

The issues are: (1) what is the nature and extent of claimant's disability and (2) is claimant entitled to future medical treatment?

**FINDINGS OF FACT**

Claimant, currently 28 years old, worked for respondent, a manufacturer of large fiberglass tanks. On November 29, 2013, claimant was bending over to attach a chain to a fiberglass lid that was approximately 10 meters in diameter and weighed about 800 pounds. The lid, which was held vertically by a forklift, tipped, hit claimant's head and knocked him to the ground. Claimant, who speaks Spanish, testified through an interpreter that he was unconscious for about two minutes.

Claimant was taken by ambulance to an emergency room and diagnosed with a contusion to the top of his head and a mild concussion. Claimant had CT scans of his head and neck and thereafter received treatment from various medical professionals. The imaging studies and treatment records are not part of the evidentiary record.

Claimant testified the accident caused injuries to the back of his head, his neck with pain into his right arm, his right shoulder, and his low back with pain going into his right leg, in addition to leg numbness and tingling. He denied prior problems with such body parts.

On December 4, 2014, David Hufford, M.D., who is board-certified as an occupational physician and as an independent medical examiner, evaluated claimant at his attorney's request. The doctor took a history from claimant through an interpreter and reviewed some medical records. Claimant reported being struck on top of his head and losing consciousness for around five minutes. The doctor understood claimant was standing upright when the accident occurred. Claimant complained of neck pain radiating into his right arm and low back pain radiating into his right leg.

On physical examination, Dr. Hufford noted claimant had no direct cervical or lumbar vertebral tenderness and no trigger points or guarding, but had tenderness throughout his cervical paraspinal musculature and across the upper scapulas and throughout his lumbar paraspinal musculature without tenderness over his sacroiliac joints. Bilateral straight leg raise testing was positive. Upper and lower extremity strength was normal, with equal reflexes bilaterally. Dr. Hufford testified claimant's spinal range of motion was normal. The doctor reviewed a lumbar MRI report showing a slight right L5-S1 disc herniation without impingement on any nerve root.

Dr. Hufford concluded claimant had a work-related axial loading injury – "a force exerted along the axis of the body, the long axis from the crown of the head all the way to the lower end of the spine which ends at the sacrum"<sup>1</sup> – with a resulting concussion, neck pain and low back pain. The doctor stated:

His injury appears to have been an axial loading mechanism accompanied by loss of consciousness and a contemporaneous complaint of low back pain. It is unclear based on his mechanism of injury whether or not torsion of the trunk occurred when he fell but this is certainly possible and would be the source of injury to the lumbar spine in this work incident. There is clearly by mechanism of injury the possibility of cervical spine pathology. His loss of consciousness indicates a concussion and the symptoms have apparently cleared without residual.<sup>2</sup>

---

<sup>1</sup> Hufford Depo. at 29.

<sup>2</sup> *Id.*, Ex. 2 at 2.

Dr. Hufford testified, "I felt that he had suffered an axial loading injury which had caused a concussion due to his loss of consciousness, as well as neck and lower back injuries."<sup>3</sup> The doctor also testified, "[A] heavy lid striking the crown of the head . . . creates axial loading force which . . . can cause a fracture or it can cause a herniated disc. So, if that history was accurate, then I certainly think there could have been an injury to the cervical spine resulting in symptomatology."<sup>4</sup> Dr. Hufford testified he did not see in claimant's medical records "documentations repeatedly of neck pain, that was a complaint he related to me on the day of my examination that I did not find extensive documentation for."<sup>5</sup> The doctor agreed there was some delay in claimant reporting low back pain and it would be unusual for an axial loading injury to result in low back pain. Dr. Hufford thought claimant could have injured his low back by twisting it (a torsional injury), while acknowledging the medical records contained no such mechanism of injury. The doctor also testified he could not say it was more probably true than not that claimant had a torsional injury; such theory was simply the doctor's proposed mechanism of injury.

Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 4th Edition (*Guides*), Dr. Hufford gave claimant a combined 10% whole body functional impairment based on a 5% cervicothoracic impairment and a 5% lumbosacral impairment. Dr. Hufford issued no permanent restrictions and stated claimant's future medical needs may include an MRI and injections. The doctor indicated claimant would benefit from a prescription strength nonsteroidal medication and a muscle relaxant.

On January 12, 2015, respondent told claimant to do his work, but he declined because his back hurt. Claimant testified respondent had police remove him from the work facility and terminated claimant's employment. Claimant has not subsequently worked and testified he cannot work because of his pain.

On February 16, 2015, the judge ordered Jon O'Neal, M.D., a board-certified occupational and environmental medicine physician, to perform an independent medical examination (IME) of claimant. Dr. O'Neal examined claimant on April 14, 2015, interviewed claimant through an interpreter and reviewed medical records. Claimant reported being struck on the top of the head, knocked unconscious for an indeterminate time, being pushed to the floor and possibly falling on his right side. Also, claimant told Dr. O'Neal the accident occurred on a Friday and he had low back pain preventing him from getting out of bed two days later on Sunday. Claimant complained of low back pain extending down his right leg (including cramping, shocking sensations and numbness in his leg), right arm pain and headaches, sometimes severe, with occasional dizziness.

---

<sup>3</sup> *Id.* at 8.

<sup>4</sup> *Id.* at 29.

<sup>5</sup> *Id.* at 13-14.

Claimant walked slowly and favored his right leg. Among findings detailed by Dr. O'Neal, claimant was diffusely tender over his lower right lumbar musculature without spasm. Back range of motion was decreased with poor effort. Claimant's cervical musculature was nontender. His neck had full range of motion and good strength. Claimant reported mild diffuse tenderness of his right mid and upper trapezius muscle.

The doctor also reviewed extensive medical records noted in his report. According to Dr. O'Neal, claimant had numerous changing symptoms throughout his treatment. Dr. O'Neal, in reviewing the medical records, noted claimant did not complain about low back pain until two and one-half weeks after the accident and did not complain about neck pain until almost a year after the accident.

Dr. O'Neal assessed claimant with a "relatively minor trauma to the top of his head"<sup>6</sup> that resulted in a contusion and mild concussion, both of which had resolved by December 16, 2013. The doctor opined claimant's accident was the prevailing factor for the head contusion and concussion, but was not the prevailing factor for claimant's "numerous other complaints."<sup>7</sup> According to the doctor, claimant's case involved many inconsistencies, including numerous and changing symptoms and diagnoses. In fact, the doctor stated claimant's case "presented . . . more history and physical examination inconsistencies than any [IME] I have performed in my career."<sup>8</sup> Dr. O'Neal noted that if claimant had a low back injury from the accident, he would have had symptoms at that time or within a few hours or perhaps a few days at most, not two weeks later or more. The doctor opined claimant suffered no permanent impairment as a result of his injuries, gave no permanent restrictions and indicated claimant required no further treatment.

Dr. O'Neal disagreed with Dr. Hufford's opinions for the following reasons:

First, it is questionable whether or not Mr. Calderon had an actual loss of consciousness. Second, Mr. Calderon did not have a contemporaneous complaint of low back pain, his low back pain started over 2 weeks after the incident. Third, there is no documentation that Mr. Calderon had torsion of his trunk when he fell. Fourth, trauma to the head certainly can cause possible cervical spine pathology however Mr. Calderon did not complain of specific pain in his cervical neck until almost a year after the incident (he did note some scapular pain a few days after the incident, but not of neck pain until many months afterwards). Fifth, the statements "unclear based on mechanism of injury", and "certainly possible" would not meet the state of Kansas Worker's Compensation requirements for prevailing factor.<sup>9</sup>

---

<sup>6</sup> O'Neal Report (filed May 5, 2015) at 18.

<sup>7</sup> *Id.* at 19.

<sup>8</sup> *Id.* at 16.

<sup>9</sup> *Id.* at 18.

Pages five and six of the judge's Award state:

The court has before it two opinions as to Calderon's functional impairment, those of Dr. Hufford who was retained by Calderon's attorney to provide an impairment rating, and those of Dr. O'Neal, who performed a court-ordered neutral examination. Dr. Hufford's rating opinions are flawed, in several respects. As to the cervical spine, despite having access to Calderon's treatment records, Dr. Hufford failed to perceive that his examination was the first time Calderon reported neck pain - more than a year after the work accident. Despite an essentially normal examination [with] only subjective complaints of pain, Dr. Hufford diagnosed an unspecified injury to the cervical spine and assessed a 5% impairment of function. In contrast, Calderon also had a normal cervical examination by Dr. O'Neal. The normal examination and absence of previous cervical spine complaints persuaded Dr. O'Neal that the work accident was not the prevailing factor in causing the cervical spine complaints.

Dr. Hufford resorted to rank speculation that Calderon experienced torsion to the trunk during the fall, in order to explain an injury to the lumbar spine. There was no history provided to Dr. Hufford to support such speculation. He also represented that the lumbar spine pain was "contemporaneous," when the Emergency Room records denied any low back pain, and the first report of low back pain does not appear in Calderon's treatment records until December 9, 2013, two weeks after the work accident. The initial complaints of low back pain were thought to be the product of a urinary tract infection and dysuria. Dr. Hufford also failed to recognize or appreciate the many discrepancies in Calderon's examinations and complaints documented by P.A. Molstadt.

In contrast, Dr. O'Neal, as a neutral examiner, found insufficient evidence to conclude that the work accident was the prevailing factor in causing Calderon's low back complaints. The absence of any evidence of Calderon experiencing torsion to the spine as he fell, the delay in reporting low back pain, the inconsistent examinations and complaints, and a largely unremarkable examination all combined to support Dr. O'Neal's opinions.

The medical evidence is in general agreement that Calderon suffered no functional impairment as a result of the head injury suffered November 29, 2013.

The court adopts the findings and opinions of its neutral examiner, Dr. O'Neal, and finds and concludes that **Calderon has failed to sustain his burden of proof that he suffered any permanent functional impairment as a result of the November 29, 2013 work accident.**

**Claimant has further failed to sustain his burden of proof of entitlement to future medical treatment for his head injury. The neck and back complaints are not attributable to the work injury, and future medical care for those complaints are Calderon's responsibility.** (Emphasis in original).

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. According to K.S.A. 2013 Supp. 44-501b(c) and K.S.A. 2013 Supp. 44-508(h), the burden of proof is on the claimant to establish the right to an award of compensation, using a more probably true than not true standard and consideration of the whole record. Proof of a causal relationship between an injury and a claimant's employment must be based on more than speculation.<sup>10</sup>

K.S.A. 2013 Supp. 44-510h(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

Board review of an order is de novo on the record.<sup>11</sup> A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.<sup>12</sup> The Board, on de novo review, makes its own factual findings.<sup>13</sup>

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>14</sup> The trier of fact decides which testimony is more accurate and/or credible and may adjust the medical testimony with the testimony of claimant and any other testimony relevant to the issue of disability. The trier of fact must decide the nature and extent of injury and is not bound by the medical evidence.<sup>15</sup>

---

<sup>10</sup> *Chriestenson v. Russell Stover Candies*, 46 Kan. App. 2d 453, 460-61, 263 P.3d 821 (2011), *rev. denied* 294 Kan. 943 (2012).

<sup>11</sup> See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

<sup>12</sup> See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

<sup>13</sup> See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

<sup>14</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>15</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *superseded on other grounds by statute*; see also *Smalley v. Skyy Drilling*, No. 111,988, 2015 WL 4366531 (Kansas Court of Appeals unpublished opinion filed June 26, 2015).

### ANALYSIS

Both medical experts indicated claimant's head injury and mild concussion resolved without sequelae. The court-ordered physician, Dr. O'Neal, was direct in concluding claimant sustained no permanent impairment of function whatsoever. In numerous decisions that need not be cited, the Board has often, but not always, given some deference to the conclusions of court-ordered and neutral physicians. Of course, "Neutrality isn't the only marker of credibility; an expert's conclusions, to be reliable, should be based on more than speculation."<sup>16</sup> The Board does not find Dr. O'Neal's opinions to be speculative.

The judge did not find Dr. Hufford's opinions credible, largely because his opinions were based on "rank speculation." The Board generally agrees Dr. Hufford's opinions are based on improper assumptions. Contrary to Dr. Hufford's opinion, claimant did not have contemporaneous low back pain following the accident. Dr. Hufford acknowledged "some delay" in claimant reporting low back pain. Dr. O'Neal noted claimant only complained of a head contusion and concussion on the date of injury and indicated claimant's low back complaints were first present on December 16, 2013, about two and one-half weeks post-accident. Claimant complained of pain into his back on December 9, 2013, but this reference appears to concern claimant's upper back and scapular areas.

For Dr. Hufford's axial loading force theory, he assumed claimant was standing upright when the lid struck his head. However, claimant testified he was bent over when the accident occurred. Even if there was an axial loading force injury, Dr. Hufford merely indicated such mechanism of injury "can cause" or "could have" caused a cervical injury or that the mechanism of injury raised "the possibility of cervical spine pathology."<sup>17</sup> The doctor's testimony and his report show his opinions are more based on possibilities, not probabilities. Dr. Hufford also noted the medical records contained no mention of claimant having neck pain until his December 4, 2014 evaluation.

Dr. Hufford acknowledged it would be unusual for an axial loading force injury to cause low back pain. The doctor speculated claimant may have twisted his low back (had a torsional injury) in the accident, while acknowledging such alternate mechanism of injury was "unclear" and not contained in the medical records he reviewed. In fact, Dr. Hufford could not conclude, more probably than not, that claimant had a twisting injury.

---

<sup>16</sup> *Buchanan v. JM Staffing, LLC*, No. 114,502, 2016 WL 4492590 (Kansas Court of Appeals unpublished opinion filed Aug. 26, 2016).

<sup>17</sup> The Board finds Dr. Hufford's use of the word "clearly" in his report as an adjective to "possibility" still creates nothing more than a possibility, not a probability. The doctor's testimony that there "certainly" could have been an injury to claimant's cervical spine is in the same vein.

The Board concludes claimant did not injure his low back or neck in his work-related injury by accident and he did not prove, more probably true than not true, that he sustained any resulting permanent impairment of function.

Regarding future medical treatment, no doctor indicated claimant needed additional treatment for his resolved head injury or concussion. Dr. Hufford's opinion that claimant requires future medical treatment is based on claimant having sustained neck and low back injuries on November 29, 2013. On the other hand, Dr. O'Neal indicated all of claimant's complaints, apart from the resolved head contusion and concussion, are unrelated to the work-related injury by accident. The Board concludes claimant did not prove entitlement to future medical treatment.

### **CONCLUSIONS**

Claimant did not injure his low back or neck in his work-related injury by accident and did not prove that he sustained permanent impairment of function. He did not prove entitlement to future medical treatment.

### **AWARD**

**WHEREFORE**, the Board affirms the June 10, 2016 Award.<sup>18</sup>

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2016.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
<sup>18</sup> As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal. Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.



ec: Scott J. Mann  
smann@mannwyattrice.com  
cbarr@mannwyattrice.com

Kip A. Kubin  
kak@kc-lawyers.com  
aem@kc-lawyers.com

Honorable Bruce E. Moore